

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REBECCA COUSINEAU and SAM DUA,
individually on their own behalf and on behalf
of all others similarly situated,) No. C11-1438-JCC
Plaintiffs,) RULE 29 STIPULATION AND
v.) ORDER REGARDING
MICROSOFT CORPORATION, a Delaware) DISCOVERY
corporation,)
Defendant.)

Plaintiffs Rebecca Cousineau and Sam Dua (“Plaintiffs”) and Defendant Microsoft Corporation (“Microsoft”) do hereby stipulate and agree to this protective order under Federal Rules of Civil Procedure 29 in the interest of efficiency and judicial economy, particularly in the interest of avoiding ancillary litigation of discovery issues relating to confidential commercial and/or proprietary information, and the procedures set forth herein for designating and protecting confidential commercial and/or proprietary information. Plaintiffs and Defendant stipulate as follows:

1. The disclosing party who designates any material “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” bears the burden of establishing the “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” status of such material in any situation in which the

1 designation is at issue, and nothing in this Order shall be construed to alter such burden. This
 2 Order is stipulated to and entered without prejudice to the rights of any party to assert or
 3 contest the "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" status of any material as
 4 set forth herein.

5 2. This Order shall apply to and govern all depositions, documents, information
 6 or things produced in response to requests for production of documents, answers to
 7 interrogatories, responses to requests for admissions, and all other discovery taken under the
 8 Federal Rules of Civil Procedure, as well as testimony adduced at trial, matters in evidence,
 9 and other information which the disclosing party designates as "CONFIDENTIAL" or
 10 "ATTORNEYS' EYES ONLY" hereafter furnished, directly or indirectly, by or on behalf of
 11 any party or any non-party in connection with this action. As used here, "disclosing party"
 12 shall refer to the parties to this action or to non-parties who give testimony or produce
 13 documents or other material.

14 3. The designation "CONFIDENTIAL" is limited to information any producing
 15 party, including any non-party, in good faith believes to contain (a) such material or matter
 16 used by it in, or pertaining to, its business, which is not generally known and which the party
 17 normally would not reveal to third parties or would cause third parties to maintain in
 18 confidence; (b) any trade secret or other confidential research, design, development, or
 19 commercial information; and (c) information that should otherwise be subject to confidential
 20 treatment pursuant to the Federal Rules of Civil Procedure, including but not limited to Rule
 21 26(c)(1)(G).

22 4. The designation "ATTORNEYS' EYES ONLY" is limited to information any
 23 producing party, including any non-party, in good faith believes to contain (a) such material
 24 or matter used by it in, or pertaining to, its business, which is not generally known and which
 25 the party normally would not reveal to third parties or would cause third parties to maintain in
 26 confidence; (b) any trade secret or other confidential research, design, development, or

1 commercial information; and (c) information that should otherwise be subject to confidential
 2 treatment pursuant to the Federal Rules of Civil Procedure, including but not limited to Rule
 3 26(c)(1)(G), that is entitled to a higher level of protection due to its commercial sensitivity.

4 5. A party receiving material designated as "CONFIDENTIAL," or
 5 "ATTORNEYS' EYES ONLY" by the producing party or non-party shall use that material
 6 solely for the purpose of conducting this litigation, but not for any other purpose whatsoever.

7 6. In the absence of written permission from the disclosing party or non-party, or
 8 an order of the Court, material designated as "CONFIDENTIAL" may be disclosed by the
 9 parties only to the following persons:

10 a) The attorneys working on this action on behalf of any party, including
 11 in-house attorneys, paralegals, and staff, stenographic and clerical employees, and contractors
 12 working under the direct supervision of counsel;

13 b) Any expert or consultant not employed by a party who is expressly
 14 retained or sought to be retained by any attorney described in paragraph 6(a) to assist in
 15 preparation of this action for trial or for motions, with disclosure only to the extent reasonably
 16 necessary to perform such work;

17 c) The named individual plaintiffs, with disclosure only to the extent
 18 reasonably necessary for the individual named plaintiff's participation in the case as
 19 determined in good faith by plaintiff's counsel, and defendants' employees who are required
 20 by a defendant to work directly on this litigation, with disclosure only to the extent necessary
 21 to perform such work;

22 d) Any person from whom testimony is taken, except that such person (i)
 23 may only be shown copies of "CONFIDENTIAL" material in preparation for and during
 24 her/his testimony if it concerns his/her testimony (relevance is determined in good faith by
 25 counsel preparing the deponent), and (ii) may not retain any "CONFIDENTIAL" material;
 26 and

- e) The Court, jury, court personnel, court reporters, and other persons connected with the Court.

7. In the absence of written permission from the disclosing party or non-party, or an order of the Court, material designated as "ATTORNEYS' EYES ONLY" may not be disclosed to the named plaintiffs, or any employee, officer, or director of a party except as set forth below:

a) The persons set forth in paragraphs 6(a) and 6(e);

b) Any expert or consultant not employed by a party, and who qualifies as an Approved Expert or Approved Consultant as described in Paragraph 8, who is expressly retained or sought to be retained by any attorney described in paragraph 6(a) to assist in preparation of this action for trial or for motions, with disclosure only to the extent reasonably necessary to perform such work; and

c) Any person of whom testimony is taken, except that such person may only be shown copies of "ATTORNEYS' EYES ONLY" in preparation for and during his/her testimony if it concerns his/her testimony (relevance is determined in good faith by counsel preparing the deponent), and may not retain any such material.

8. To qualify as an Approved Expert or an Approved Consultant, the party proposing to provide “ATTORNEYS’ EYES ONLY” material to such expert or consultant shall provide the party that produced such materials with: (i) a current curriculum vitae for the expert or consultant, which shall include a description of past and present employers by whom the expert or consultant has been employed and (subject to the second sentence of this paragraph) persons or entities by whom the expert or consultant has been engaged in any consulting or expert engagements within the last five years, as well as a general description of the nature of such engagements, and (ii) a copy of a completed and signed copy of the annexed “ACKNOWLEDGMENT.” If an expert or consultant is precluded by virtue of a non-disclosure agreement from disclosing either the existence or nature of any such

1 engagement or the identity of the entity for which the services were or are being performed,
 2 then the expert or consultant shall state that certain information is being withheld on that basis
 3 and may supplement his/her disclosure with such additional information as he/she believes
 4 would be helpful to the parties and the Court in determining whether any undisclosed
 5 consulting relationship would create a genuine likelihood that the expert or consultant would,
 6 in the course of any such undisclosed engagement, use or disclose information designated
 7 “ATTORNEYS’ EYES ONLY” for purposes other than this litigation.

8 a) Within five business days after the other party’s receipt of the
 9 information and signed undertaking described above from the party seeking approval, the
 10 other party may object in writing to the proposed expert or consultant if facts available to that
 11 party show there is a reasonable likelihood the proposed expert or consultant will use or
 12 disclose information designated “ATTORNEYS’ EYES ONLY” for purposes other than this
 13 litigation or if the expert or consultant states he/she is unable to disclose information
 14 concerning other engagements due to a non-disclosure agreement. Failure to object in writing
 15 to a proposed expert or consultant within five business days is deemed approval, but shall not
 16 preclude a party from objecting to continued access to material designated as “ATTORNEYS’
 17 EYES ONLY” by that expert or consultant where facts subsequently learned by the party or
 18 its counsel suggest a basis for such an objection.

19 b) If the other party objects to the proposed expert or consultant, the
 20 parties shall meet and confer in good faith in an attempt to resolve their dispute without resort
 21 to the Court. If the parties’ dispute remains unresolved as of five judicial days following the
 22 objecting party’s communication of its objection, then the party seeking to make or continue
 23 disclosure to such expert or consultant may seek a ruling from the Court as to the merits of the
 24 other party’s objection. Pending a ruling by the Court, the proposed expert or consultant shall
 25 not have access to material or information designated by the objecting party as
 26 “ATTORNEYS’ EYES ONLY” unless such access has been previously approved.

1. The persons described in paragraph 6(b), (c), and (d) shall have access to the
 2. “CONFIDENTIAL” material, and the persons described in paragraph 7(c) shall have access to
 3. the “ATTORNEYS’ EYES ONLY” material, only after they have been made aware of the
 4. provisions of this Order and have manifested their assent to be bound thereby by signing a
 5. copy of the annexed “ACKNOWLEDGMENT.” The persons receiving “CONFIDENTIAL”
 6. and “ATTORNEYS’ EYES ONLY” material are enjoined from disclosing that material to
 7. any other person, except in conformance with this Order. This paragraph does not apply
 8. when a party in good faith seeks to use a “CONFIDENTIAL” or “ATTORNEYS’ EYES
 9. ONLY” document at a deposition of a deponent who has not already signed the
 10. ACKNOWLEDGMENT, in which case the party’s obligation shall be to ask the deponent to
 11. sign the ACKNOWLEDGMENT, but the party’s right to proceed with the deposition and to
 12. use “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” material at the deposition shall
 13. not depend on the deponent’s willingness to do so.

14. A list shall be maintained by counsel for the parties hereto of the names of all
 15. persons (except for counsel and their support personnel) to whom any “CONFIDENTIAL” or
 16. “ATTORNEYS’ EYES ONLY” material is disclosed, or to whom the information contained
 17. therein is disclosed, and such list shall be available for inspection by the Court or opposing
 18. counsel upon request, and with a good faith belief that this Order has been violated, except
 19. that a party or a party’s counsel is not required to identify by name a consulting expert except
 20. as otherwise provided by the Federal Rules of Civil Procedure or Paragraph 8, above. Upon
 21. request made within 60 calendar days of the termination of this lawsuit by settlement, final
 22. judgment, or otherwise, including final appellate action or the expiration of time to appeal or
 23. seek further review, the parties shall provide opposing counsel with a copy of the
 24. aforementioned lists, except that a party or a party’s counsel shall not be required to identify
 25. by name a consulting expert except as otherwise provided by the Federal Rules of Civil
 26. Procedure or Paragraph 8, above, provided, however, that upon a showing by a disclosing

1 party of a good faith basis for believing that this Order has been violated, a party is required to
 2 disclose whether any consulting expert has been given access to “CONFIDENTIAL” or
 3 “ATTORNEYS’ EYES ONLY” material of the type or category of “CONFIDENTIAL” or
 4 “ATTORNEYS’ EYES ONLY” material involved in the alleged or suspected breach.

5 11. Each individual who receives any “CONFIDENTIAL” or “ATTORNEYS’
 6 EYES ONLY” material hereby agrees to subject himself/herself to the jurisdiction of this
 7 Court for the purpose of any proceedings relating to the performance under, compliance with,
 8 or violation of this Order.

9 12. The recipient of any “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY”
 10 material that is provided under this Order shall maintain such material in a secure and safe
 11 area and shall exercise due and proper care with respect to the storage, custody, use, and/or
 12 dissemination of such material. “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY”
 13 material shall not be copied, reproduced, summarized, extracted, or abstracted, except to the
 14 extent that such copying, reproduction, summarization, extraction, or abstraction is reasonably
 15 necessary for the conduct of this lawsuit. All such copies, reproductions, summarizations,
 16 extractions, and abstractions shall be subject to the terms of this Order and labeled in the same
 17 manner as the designated material on which they are based.

18 13. Disclosing parties or non-parties shall designate “CONFIDENTIAL” or
 19 “ATTORNEYS’ EYES ONLY” material as follows:

20 a) In the case of documents, interrogatory answers, responses to requests
 21 to admit, and the information contained therein, designation shall be made by placing the
 22 following legend on every page of any such document before production:
 23 “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY.” In the event that a party or non-
 24 party inadvertently fails to stamp or otherwise designate a document or other material as
 25 “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” at the time of its production, that
 26 party or non-party may at any time thereafter may stamp or otherwise designate the document

1 or other material as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY." The delay in
 2 designating a document as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" is not, in
 3 and of itself, a waiver of any of the protections of this Order, but such document or other
 4 material shall be treated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" beginning
 5 only at the time such designation occurs.

6 b) "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" material may
 7 be used in depositions. Designation of the portion of the deposition transcript (including
 8 exhibits) which contains "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" material
 9 shall be made by a statement to such effect on the record in the course of the deposition or,
 10 upon review of such transcript, by counsel for the party or non-party to whose
 11 "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" material the deponent has had access,
 12 which counsel shall so designate within 14 calendar days after counsel's receipt of the
 13 transcript. During those 14 calendar days, the entire deposition transcript, including exhibits,
 14 is deemed "CONFIDENTIAL," unless counsel during the deposition states that the
 15 information is "ATTORNEYS' EYES ONLY" in which case that portion of the deposition
 16 designated as "ATTORNEYS' EYES ONLY" shall carry that designation for the 14-day
 17 period.

18 c) Any "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" material
 19 produced in a non-paper media (e.g., videotape, audiotape, computer disk, etc.) may be
 20 designated as such by labeling the outside of such non-paper media as "CONFIDENTIAL" or
 21 "ATTORNEYS' EYES ONLY" and producing this material in a sealed envelope. In the
 22 event a receiving party generates any electronic copy, "hard copy," transcription, or printout
 23 from any such designated non-paper media, such party must treat each copy, transcription, or
 24 printout as designated and label it in a manner effective to ensure proper treatment.

25 14. A party is not obligated to challenge the propriety of a "CONFIDENTIAL" or
 26 "ATTORNEYS' EYES ONLY" designation at the time made, and failure to do so shall not

1 preclude a subsequent challenge thereto at any time during the course of this litigation. In the
 2 event that any party to this litigation disagrees at any stage of these proceedings with such
 3 designation, such party shall provide to the producing party or non-party written notice of its
 4 disagreement with the designation. The parties (and any non-party involved) shall first try to
 5 resolve such dispute in good faith on an informal basis consistent with the requirement to
 6 confer under Rule 26(c). If the dispute cannot be resolved, the party or non-party making the
 7 designation may request appropriate relief from the Court. Provided the party making the
 8 designation seeks relief from the Court within 30 calendar days of receiving a notice of
 9 disagreement, the materials in question shall retain their "CONFIDENTIAL" or
 10 "ATTORNEYS' EYES ONLY" status until the Court rules on any such motion. The party
 11 making the designation may request a telephonic hearing with respect to the
 12 "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" status of materials in compliance
 13 with Local Rule 7(i). Nothing in this paragraph shall alter the burden of the disclosing party
 14 of establishing the "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" status of material.

15. Documents containing "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY"
 16 material shall not be filed with the Court unless it is reasonably necessary to do so for
 17 purposes of trial or motions, including without limitation, class certification, preliminary
 18 injunction, summary judgment, or other Court matters. The filing party shall take reasonable
 19 steps to file "CONFIDENTIAL" and "ATTORNEYS' EYES ONLY" material under seal in
 20 compliance with Local Rule 5(g).

21. If a party wishes to use "CONFIDENTIAL" or "ATTORNEYS' EYES
 22 ONLY" material to support or oppose a motion or at trial, the following procedures shall
 23 apply:

24. a) The party submitting the material shall submit to the Court a motion to
 25 seal pursuant to CR 5(g)(2) contemporaneous with the filing of the "CONFIDENTIAL" or
 26
 27

1 “ATTORNEYS’ EYES ONLY” material and shall adhere to all requirements in CR 5(g) for
2 filing such material under seal.

3 b) If the disclosing party or non-party is not the party filing the motion to
4 seal, then the disclosing party or non-party shall make the showing required by Local Rule
5(g) in its response to the motion.

6 c) Any motion to seal filed under any subsection of this Paragraph 16
7 shall be noted for consideration not fewer than 15 judicial days after filing. The Clerk of the
8 Court shall maintain the “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” material
9 under seal until the Court rules on the motion to seal, subject to the provisions of the
10 following paragraph.

11 17. In the event the Court denies a motion to seal documents labeled
12 “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY,” the Clerk of the Court shall leave the
13 documents under seal for a period of three judicial days after the date of the Court’s denial of
14 the motion to seal. If the filing party initially designated the documents “CONFIDENTIAL”
15 or “ATTORNEYS’ EYES ONLY,” then within that three-day period, the filing party may, at
16 its option, file replacement documents that do not contain “CONFIDENTIAL” or
17 “ATTORNEYS’ EYES ONLY” material, in which case the documents initially filed under
18 seal shall be returned to the filing party and not be considered by the Court. If the filing party
19 does not file replacement documents within the time period prescribed by this paragraph, the
20 material shall be unsealed in the Court file.

21 18. In the event any “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY”
22 material is used in any court proceeding in connection with this litigation, it shall not lose its
23 “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” status through such use, and the
24 parties shall take steps reasonably required to protect its confidentiality during such use.

25 19. If “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” material is
26 disclosed to any person other than in the manner authorized by this Order, the person or party

1 responsible for the disclosure must seasonably bring all pertinent facts relating to such
 2 disclosure to the attention of counsel for the designating party or non-party and, without
 3 prejudice to any other rights and remedies of the parties or non-parties, make every effort to
 4 prevent further disclosure by it or by the person who was the recipient of such material.

5 20. Nothing in this Order shall preclude any party or non-parties to the lawsuit or
 6 their attorneys (a) from showing a document designated as "CONFIDENTIAL" or
 7 "ATTORNEYS' EYES ONLY" to an individual who either prepared the document or is
 8 identified on the face of the document as an addressee or copy addressee; or (b) from
 9 disclosing or using, in any manner or for any purpose, any material or documents from the
 10 disclosing party's or non-party's own files which the disclosing party or non-party itself has
 11 designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY."

12 21. In the event any receiving party having possession, custody, or control of any
 13 "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" material receives a subpoena, request
 14 for production of documents, other process, or order to produce such material in another,
 15 unrelated legal proceeding, from a non-party to this action, such receiving party shall (1) give
 16 notice of the subpoena, request for production of documents, other process, or order to
 17 counsel for the disclosing party or non-party that designated the material as
 18 "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY"; (2) furnish counsel for that
 19 disclosing party or non-party with a copy of said subpoena, request for production of
 20 documents, other process, or order; and (3) cooperate with respect to all reasonable and
 21 legitimate procedures sought to be pursued by the disclosing party or non-party whose
 22 interests may be affected. The disclosing party or non-party asserting the
 23 "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" treatment shall have the burden of
 24 defending against such subpoena, request for production of documents, other process, or
 25 order. The party receiving the subpoena, request for production of documents, other process,
 26 or order shall be entitled to comply with it except to the extent the disclosing party or non-

1 party asserting the “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” treatment is
2 successful in obtaining an order modifying or quashing the subpoena, request for production
3 of documents, other process, or order.

4 22. The inadvertent production in the course of discovery in this action of any
5 document or material (whether designated as “CONFIDENTIAL” or “ATTORNEYS’ EYES
6 ONLY” or not) is not a waiver of any attorney-client privilege, work product protection, or
7 other privilege or immunity that would otherwise attach to the document or material produced
8 or to other documents or material consistent with Federal Rule of Evidence 502(b), as long as
9 the disclosing party or non-party, promptly after discovery, notifies the other party or parties
10 of the claim of privilege or other protection or immunity. Upon such notice, the other party or
11 parties shall promptly destroy all copies of the documents or material referred to in their
12 possession, custody and control, and notify the disclosing party or non-party that it has done
13 so, and shall notify the disclosing party or non-party of any other persons to whom the
14 document has been provided and take reasonable steps to retrieve it from such persons
15 consistent with Rule 26(b)(5)(B). Such destruction and notice shall not constitute an
16 acknowledgment that the claimed document or material is in fact privileged or entitled to
17 protection or immunity.

18 23. Within 60 calendar days of the termination of litigation between the parties,
19 including final appellate action or the expiration of time to appeal or seek further review, all
20 “CONFIDENTIAL” material, all “ATTORNEYS’ EYES ONLY” material, and all copies
21 thereof shall be returned to the disclosing party or non-party or shall be destroyed. If
22 destroyed, counsel shall certify the destruction and provide a copy of the certification to the
23 producing party or non-party. Counsel for each party is entitled to retain all pleadings, motion
24 papers, legal memoranda, correspondence, and work product.

25 24. Except as specifically provided herein, the terms, conditions, and limitations of
26 this Order shall survive the termination of this action.

25. This Order is without prejudice to the right of any party or non-party to seek relief from the Court, from any of the provisions contained herein.

26. This Order shall not be construed as waiving any right to assert a claim of privilege, relevance, overbreadth, burdensomeness, or other grounds for not producing material called for, and access to all material (whether designated as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" or not) is only as provided by the discovery rules and other applicable law.

ORDER

IT IS SO ORDERED.

DATED this 13th day of November 2012.

John C. Conner

The Honorable John C. Coughenour
United States District Judge

Stipulated and jointly presented this 9th day of November, 2012 by:

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ACKNOWLEDGMENT

The undersigned hereby acknowledges that he/she has read the RULE 29
STIPULATION AND ORDER, which was entered by the Court on _____
_____ in *Cousineau et al. v. Microsoft Corp.*, U.S. District Court, Western District of
Washington at Seattle, Case No. C11-01438 JCC; that he/she is one of the persons
contemplated in paragraphs 6 or 7 thereof as authorized to receive disclosure of material
designated “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY,” respectively, by one of
the parties or by non-parties; and that he/she has read and fully understands and agrees to
abide by the obligations and conditions of that Order.

(Signature)

(Printed Name)

(Title or Position)

(Company)

Dated: _____

Dated: _____